



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2702

Freedom of Information Act Procedural Rules

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Mine Safety and Health Review Commission (the Commission) is proposing revisions to its rules implementing the Freedom of Information Act (FOIA) in light of the FOIA Improvement Act of 2016, its experience under the rules, the need to update its fee schedule, and the need to update and clarify a number of its FOIA procedures. These proposed changes ensure rapid and effective procedures for requesting information and processing requests under the FOIA.

DATES: Send comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may send comments by any of the following methods:

- E-mail: RulesComments@fmsshrc.gov. Include “Comments on FOIA rules” in the subject line of the message.
- Mail: Michael A. McCord, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710.

All comments received will be posted without change to

www.fmshrc.gov/content/proposed-foia-rules, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Michael A. McCord, General Counsel, 202-434-9900, MMccord@fmshrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission is an independent adjudicatory agency that provides hearings and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). Hearings are held before the Commission’s Administrative Law Judges, and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate.

In accordance with the amendments made by the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538, to the Freedom of Information Act, 5 U.S.C. 552, the Commission is proposing to revise its rules on procedures for the disclosure of records under the FOIA, including procedures for engaging in dispute resolution through the FOIA Public Liaison and the Office of Government Information Services (“OGIS”) and the requirement that requesters be given a minimum of 90 days to file an administrative FOIA appeal.

Additionally, the proposed revisions include clarification on the types of information that a requester must provide in order to facilitate a FOIA search of the agency’s records, additional circumstances under which expedited

processing will be granted, and increases in certain fees. Based on its years of experience in implementing the FOIA, the Commission is proposing the changes set forth below in its FOIA rules to better reflect agency practice under the rules and to clarify our FOIA processes to the requester community. Lastly, while the proposed rules retain much of the substantive practices and procedures in effect prior to this proposal, they have been extensively reorganized under new section headers and paragraph headers. The Commission is also proposing adding two new procedural rules, one addressing confidential commercial information and the other addressing the preservation of records.

II. Section-by-Section Analysis

PART 2702—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

§§2702.3 through 2702.8 [Redesignated]

Old Section	New Section(s)
2702.3(b)	2702.4(a) and (d)(1), 2702.5
2702.3(c)	2702.4(b) and (c)
2702.3(d)	2702.4(b)(2)
2702.3(e)	2702.4(b)(3)
2702.3(f)	2702.4(d)(3), 2702.5(e)
2702.3(g)	2702.4(d)(2)
2702.4	2702.7
2702.5	2702.8
2702.6	2702.9
2702.7	2702.10
2702.8	2702.11

29 CFR 2702.1

The Commission is revising 29 CFR 2702.1 to explain that the purpose of these rules is to establish procedures to implement the FOIA as amended by the

FOIA Improvement Act of 2016. The Commission is also amending 29 CFR 2702.1 to make three non-substantive revisions: (1) adding the short name of “the Mine Act” for the Mine statute; (2) clarifying that the Commission reviews legal disputes between private parties “arising under the Mine Act;” and (3) updating reference to the Commission’s website to include that the FOIA guide is located specifically at the web address <https://www.fmshrc.gov/guides/foia-guide>.

29 CFR 2702.3

The Commission is revising 29 CFR 2702.3 to limit the section’s focus to the proper procedure for making a FOIA request and to reorganize the information provided in the rule so that the requirements are more reader friendly. In addition, new paragraph headers have been added.

The information in § 2702.3(a), which was previously provided in paragraph form, has been enumerated, thereby making it easier to identify the number of requirements that must be met and to distinguish each requirement.

Pursuant to the authority of 5 U.S.C. 552(a)(3)(A), a new requirement has been added at newly added § 2702.3(a)(3), which requires requesters seeking information from cases that have come before or are currently before the Commission to provide the Commission assigned docket number (beginning with CENT, KENT, LAKE, PENN, SE, VA, WEST, WEVA or YORK) and/or the related Mine Safety and Health Administration (MSHA) issued citation or order number (not to be confused with the MSHA case number) when making a request. This change is consistent with long-standing Commission practice and is necessary in order to effectively search the Commission’s docketing database.

In newly added § 2702.3(a)(4), the language “shall describe the particular record requested to the fullest extent possible” has been replaced with “reasonably describe the particular record(s) requested.” “Reasonably describe” is taken directly from the FOIA, 5 U.S.C. 552(a)(3)(A).

The information previously contained in § 2702.3(b), (f), and (g), which explained the Commission’s procedure for responding to requests and the FOIA appeals process, has been redesignated as new §§ 2702.4 and 2702.5. New § 2702.3(b) now briefly explains the format and timing of requests for expedited processing and for fee waivers.

The information previously contained in § 2702.3(c), which explained the Commission’s procedure for taking additional time to process requests involving “unusual circumstances,” has been redesignated as new § 2702.4. New § 2702.3(c) advises individuals to refer to the Commission’s Privacy Act regulations for instructions if seeking records on him or herself that do not include cases currently or previously on review before the Commission.

The information previously contained in § 2702.3(d) discussing additional time to respond has been redesignated as new § 2702.4(b). New § 2702.3(d) now explains the procedure for properly submitting a FOIA request to the Commission.

The information previously contained in § 2702.3(e) discussing expedited processing has been redesignated as newly added § 2702.4(b)(3).

29 CFR 2702.4

The information previously contained in § 2702.4, which explained the types of records generally maintained by the Commission and how they may be publicly accessed, has been redesignated as new § 2702.7.

Section 2702.4 now contains language previously found in § 2702.3. This section now clarifies the Commission's procedures for responding to requests, processing requests, and making request determinations, and explains its long-standing multi-track processing system. Much of this information was relocated from § 2702.3.

The information in § 2702.4(a) generally explains the Commission's timetable for making a determination on a FOIA request. It notes that, generally, the Commission will respond to requests in the order they are received. This is not intended as a restriction on the Commission's ability to prioritize requests differently, if necessary.

Consistent with 5 U.S.C. 552(a)(6)(D)(i), § 2702.4(b) details the agency's longstanding, three-tier multitask processing system, which includes simple, complex, and expedited processing. Section 2702.4(b)(2) explains the "unusual circumstances" that may warrant a delayed response by the Commission.

Pursuant to 5 U.S.C. 552(a)(6)(E)(i)(II), newly added § 2702.4(b)(3) explains the time requirements for making requests for expedited processing and includes a new agency-specific criterion for requesters seeking expedited processing. The new criterion, paragraph (b)(3)(iii), allows parties engaged in litigation before the Commission to request expedited processing if the record is required to meet a fast-approaching deadline set by a Commission

Administrative Law Judge (ALJ) or the Commission. This criterion will be particularly helpful for parties requesting hearing transcripts needed to prepare post-hearing briefs.

Newly added § 2702.4(c) contains the information previously contained in § 2702.3(c)(2) explaining the aggregation of requests.

Newly added § 2702.4(d) explains the various determinations that a Commission FOIA officer can reach when processing a request under the FOIA.

In accordance with the FOIA Improvement Act of 2016, newly added § 2702.4(e) explains the dispute resolution and mediation services available to requesters and the process for attaining these services.

29 CFR 2702.5

The information previously contained in § 2702.5 under header “Fees applicable—categories of requesters,” which explained the Commission’s categories of requesters for purposes of determining the appropriate fees, has been redesignated as new § 2702.8.

Section 2702.5 now contains language previously found in § 2702.3 and added language explaining the procedures surrounding the various types of FOIA appeals, including the format and timing of appeals and the Commission’s process for reviewing appeals. The appeal language was taken from former §§ 2702.3(b), (e)(2), and (f) and 2702.7(b)(2) and consolidated under this new section.

In accordance with the Improvement Act 2016, paragraph (a) reflects the new time period in which a requester has to appeal an adverse determination,

that is not more than 90 days after the date of such determination. Paragraphs (a) through (d) include new instructions regarding the required content when filing an appeal. In paragraph (a), we also removed the word “Chairman” and added, in its place, the word “Chair.”

29 CFR 2702.6

The information previously contained in § 2702.6 under header “Fee schedule,” has been redesignated as newly added § 2702.9 under the same header. Section 2702.6 now contains the Commission’s procedure for the handling of confidential commercial information. While requests for confidential commercial information is not an issue the Commission has typically had to deal with in the past, in recent years it has seen an increase in FOIA requests that in some way relate to potentially sensitive records that mine operators may not want released to the public.

The language was adopted from the regulation template provided by the Department of Justice’s Office of Information Policy (“OIP”) in its “Template for Agency FOIA Regulations,” published on February 22, 2017. The section mirrors OIP’s sample language.

Section 2702.6(a) defines “confidential commercial information” and “submitter.” Section 2702.6(b) informs submitters what steps they must take to protect information they believe should be withheld from disclosure. This provision will be most useful for mining companies submitting sensitive commercial records during the course of litigation before the Commission. Section 2702.6(c) explains the circumstances under which a submitter of

confidential commercial information must be notified that the information has been requested and may be disclosed. It describes the different ways the Commission may satisfy the notice requirement and describes the content that must be included in the notice.

Section 2702.6(d) explains the exceptions to the submitter notice requirements. Section 2702.6(e) sets forth the process for submitters to object to disclosures. The section goes on to explain the Commission's process for addressing objected disclosures and the notices it will provide to both submitter and requester.

29 CFR 2702.7

The information previously contained in § 2702.7 under header "No fees; waiver or reduction of fees," has been redesignated as newly added § 2702.10. Section 2702.7 now contains the information previously found in § 2702.4 discussing the types of records maintained by the Commission and available to the public, as well as how records may be accessed without the need to file a FOIA request. It additionally explains what records are available to the public upon request and generally how the Commission will search for requested records.

Specifically, under FOIA, each agency must make available for public inspection and copying (without the need for a formal FOIA request) the following items: final opinions and orders issued in the adjudication of administrative cases; policy statements and interpretations that have been adopted by the agency but which were not published in the Federal Register; administrative staff

manuals that affect members of the public; and records processed and disclosed in response to a FOIA request which the agency has determined have or will become the subject of similar requests for substantially the same records (often referred to as “FOIA-processed records”). See 5 U.S.C. 552(a)(2).

Historically, agencies have generally provided access to these records in reading rooms located at one or more of the agency’s offices. However, with the increased reliance on technology, agencies have eliminated full-time reading rooms and switched to posting the records online where they are easily accessible by the public. While the Commission will continue to permit in-office inspection of records, if requested, it will primarily rely on its e-reading room to satisfy this requirement under the FOIA.

There is one substantive change to this section, which includes a new paragraph (a) that generally describes the availability of the Commission’s records. Former paragraphs (a) and (b) have been transposed and relettered as paragraphs (b) and (c). The term “FOIA Reading Room” has been replaced with the term “FOIA in-office review.”

The rule continues to model the statutory language in the FOIA. Additionally, a more detailed listing of materials available at the Commission is provided in the Commission’s FOIA Guide, also available on its website.

29 CFR 2702.8

The information previously contained in § 2702.8 under header “Advance payment of fees; interest; debt collection procedures,” has been redesignated as newly created § 2702.11.

Section 2702.8, under revised header “Categories of requesters and applicable fees,” now contains the information previously found in § 2702.5 discussing fee requester categories. This section includes newly added paragraph (f), which explains that the FOIA office may require clarification from the requester at times in order to determine proper fee category. The remainder of the section contains several minor stylistic changes to sentence structure, and descriptive headers/titles have also been added to each paragraph.

29 CFR 2702.9

Newly added § 2702.9 contains the information previously found in § 2702.6 under the same header, “Fee schedule.” This transferred content continues to outline the various fees charged by the Commission for its FOIA services. Substantively, the language of the section remains largely the same. There are minor revisions to paragraphs (a) and (b) to reflect a more accurate website location and paragraph (b) to reflect the proper rule citation in light of these amendments. The website address in paragraphs (a) and (b) has been modified to include the direct website address for the Commission’s FOIA Guide. In paragraph (b), we also removed the word “Chairman” and added, in its place, the word “Chair.”

The Commission is amending the language of paragraph (c) to state that duplication fees will be charged for records that are not routinely kept in electronic format and must be scanned for purposes of satisfying a FOIA request. Additionally, the Commission is amending the duplication fee from \$0.15 per page to \$0.25 per page to account for the cost of inflation. As most of our

records are in electronic format, we expect this increase to have very little impact on the requester community.

29 CFR 2702.10

Newly added § 2702.10 contains the information previously found in § 2702.7 under former header “No fees; waiver or reduction of fees.” Now under revised header “Waivers and reduction of fees,” this section continues to explain the circumstances under which fees will not be charged and under what circumstances a fee waiver will be granted.

Substantively, the language of the section remains largely the same. Paragraph (b) has been minimally revised to include additional information on the proper Commission procedure for requesting a fee waiver, which is also stated in amended § 2702.3(b). Paragraph (b) has been revised to reflect the proper rule citation in light of these amendments and descriptive headers/titles have been added to paragraphs (a) and (b).

29 CFR 2702.11

Newly added § 2702.11 under header “Payment of fees; advance payments; interest, debt collection,” contains the information previously found in § 2702.8 under former header “Advance payment of fees; interest; debt collection procedures.” This section continues to explain when advance payment of fees could be required, when interest charges could be assessed, and that delinquent payments would be referred to debt collection.

Substantively, the language of the section remains the same with one key exception. New paragraph (a) now explains the process for remitting payment to

the Commission for FOIA services rendered. Additionally, paragraph (b), formerly paragraph (a), has been reworded for concision, but substantively remains the same. Descriptive headers/titles have also been added to each paragraph.

29 CFR 2702.12

Newly added § 2702.12 under header “Preservation of records,” is a new addition to the Commission’s FOIA rules. This section explains the Commission’s procedure and time frames for the maintenance of its FOIA records. We believe this section will be very helpful for FOIA requesters who seek records going back a certain number of years and who are trying to determine the scope of their request prior to submission. This is a relatively common occurrence with Commission FOIA requests. This rule is intended to decrease processing times by eliminating the added correspondence that often ensues as a result of a requester seeking records that are outside of the required maintenance period.

III. Matters of Regulatory Procedure

The Commission is an independent regulatory agency, and as such, is not subject to the requirements of Executive Order (“E.O.”) 12866 (Sept. 30, 1993; 58 FR 51735, Oct. 4, 1993); E.O. 13563 (Jan. 18, 2011; 76 FR 3821, Jan. 21, 2011); E.O. 13771 (Jan. 30, 2017; 82 FR 9339, Feb. 3, 2017); or E.O. 13777 (Jan. 30, 2017; 82 FR 12285, Mar. 1, 2017). The proposed regulatory amendments also do not have Federal implications or “substantial direct effects on the States, on the relationship between the national government and the

States, or on the distribution of power and responsibilities among the various levels of government.” Therefore, E.O. 13132 is not applicable.

The Commission’s Chair has determined that this proposed rule will not “have a significant economic impact on a substantial number of small entities” under the Regulatory Flexibility Act (“RFA”) (5 U.S.C. 605) due to the limited scope of the rule and its impact of streamlining the procedures required under FOIA. The Commission has also determined that the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

List of Subjects in 29 CFR Part 2702

Administrative practice and procedure, Appeals, Confidential commercial information, Freedom of information, Privacy.

For the reasons stated in the preamble, the Federal Mine Safety and Health Review Commission proposes to revise 29 CFR part 2702 to read as follows:

PART 2702—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

Sec.

- 2702.1 Purpose and scope.
- 2702.2 Location of offices.
- 2702.3 Making a request for information.
- 2702.4 Response to request; processing; determinations.
- 2702.5 Right to appeal.
- 2702.6 Confidential commercial information.
- 2702.7 Materials available.
- 2702.8 Categories of requesters and applicable fees.
- 2702.9 Fee schedule.
- 2702.10 Waivers and reduction of fees.

2702.11 Payment of fees; advance payments; interest; debt collection.
2702.12 Preservation of records.

Authority: 30 U.S.C. 801 *et seq.*; 5 U.S.C. 551, 552, and 552a and 44 U.S.C. 3102 as amended by Public Law 104-231, 110 Stat. 3048, Public Law 110-175, 121 Stat. 2524, and Public Law 114-185, 130 Stat. 538; E.O. 13392, 70 FR 75373, 3 CFR, 2005 Comp., p. 216.

§ 2702.1 Purpose and scope.

The Federal Mine Safety and Health Review Commission (Commission), pursuant to the Federal Mine Safety and Health Act of 1977 (the “Mine Act”), 30 U.S.C. 801 *et seq.*, is an independent adjudicative agency that provides administrative trial and appellate review of legal disputes arising between the U.S. Department of Labor’s Mine Safety and Health Administration (MSHA) and private parties, as well as certain disputes solely between private parties arising under the Mine Act. The purpose of the rules in this part is to establish procedures for implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048, the OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2524, and the FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538; to provide guidance for those seeking to obtain information from the Commission; and to make all information subject to disclosure pursuant to this subchapter and FOIA, and not otherwise protected by law, readily available to the public. Additional guidance on obtaining information from the Commission can be found in the document entitled “FOIA Guide,” which is available for viewing and download on the Commission’s website at <https://www.fmshrc.gov/guides/foia-guide>. Hard copies are also available upon

written request to the Commission's FOIA Office. The rules in this part apply only to records or information of the Commission or in the Commission's custody. Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA. This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission's rules of procedure in 29 CFR part 2700.

§ 2702.2 Location of offices.

The Commission maintains its headquarters office at 1331 Pennsylvania Avenue NW, Suite 520N, Washington, DC 20004-1710. The locations of other Commission offices may be obtained from the Commission's website (<http://www.fmshrc.gov>).

§ 2702.3 Making a request for information.

(a) *Content of request.* All requests for information must:

- (1) Be in writing;
- (2) Include the words "Freedom of Information Act Request" or "FOIA" on the face of the request;
- (3) Include, if concerning a case that has come before the Commission or a Commission Administrative Law Judge, the Commission case docket

number or, in the alternative, the related MSHA citation or order number(s);

(4) Reasonably describe the particular record(s) requested; and

(5) Specify the preferred form or format in which the requester wishes to receive the response. The Commission shall accommodate requests as to form or format if the record is readily reproducible in the requested form or format. When requesters do not specify the preferred form or format of the response, the Commission shall respond in the form or format in which the record is most accessible to the Commission.

(b) *Optional content considerations.* If the requester desires expedited processing or a waiver or reduction of fees, such requests must be in writing and should be included in the initial request for information filed in accordance with paragraph (a) of this section. See §§ 2702.4(b)(3) and 2702.10 for additional requirements.

(c) *Personal records.* For individuals seeking access to their records, not including Commission files generated in adversary proceedings under the Mine Act, please see the Commission's Privacy Act rules at 29 CFR part 2705.

(d) *Submitting a request.* Requests must be submitted via:

(1) The Commission's FOIA Request form located on the Commission's website at <https://www.fmshrc.gov/foia/foia-request-form>; or by

(2) Email, mail, fax or hand delivery to the Chief FOIA Officer at FOIA@FMSHRC.gov, Federal Mine Safety and Health Review Commission, Attn: Chief FOIA Officer, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710, Fax: 202-434-9944.

§ 2702.4 Response to request; processing; determinations.

(a) *Response to request.* Upon receipt of a request, a determination to grant, deny, or partially grant the request will be made within 20 business days by the Commission's FOIA Office, except in unusual circumstances, as described in paragraph (b) of this section. Generally, the Commission will respond to requests according to their order of receipt.

(b) *Processing time.*

(1) *Simple track.* Except in circumstances described in paragraph (b)(2) or (3) of this section, upon receipt of a request, a Commission FOIA officer will reach a determination to grant, deny, or partially grant the request within 20 business days after receipt by the Commission's FOIA Office.

(2) *Complex track.* In unusual circumstances, it may not be possible for the agency to reach a determination within 20 business days. When additional time is needed to respond to the initial request, the Commission shall notify the requester in writing within the 20 business day period, describe the circumstances causing the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional business days, except as provided in paragraph (b)(2)(i) of this section.

(i) Unusual circumstances that may warrant delay include:

(A) The need to search for and collect the requested records from facilities that are separate from the office processing the request;

(B) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are requested in a single request;

(C) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial subject matter interest in the request; and

(D) The need to consult with the submitter of the records being requested.

(ii) With respect to a request for which a written notice has extended the time limit by 10 additional business days, if the Commission determines that it cannot make a response determination within that additional 10 business day period, the requester will be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request.

(3) *Expedited track.* While it is recommended that a request for expedited services be submitted with the initial § 2702.3(a) request, such request may be made at any time. A person may request expedited processing of a § 2702.3(a) request for records in cases where the requester can demonstrate a compelling need for said records. Requesters will be notified of the determination in accordance with paragraph (d)(4) of this section. A demonstration of compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of his knowledge and belief. For purposes of this paragraph (b)(3), a “compelling need” means:

(i) That a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The information is urgently needed by a person primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity; or

(iii) The records are necessary to assist with meeting an impending deadline set by a Commission Judge or the Commission in a pending case to which the requester is a party.

(c) *Aggregated requests.* Whenever it reasonably appears that certain requests by the same requester, or a group of requesters acting in concert, actually constitute a single request that would otherwise satisfy the unusual

circumstances specified in this section, and the requests involve clearly related matters, such requests may be aggregated for purposes of this paragraph (c). Multiple requests involving unrelated matters will not be aggregated.

(d) *Determinations.*

(1) *Full grant of request.* Unless a Commission FOIA officer reasonably foresees that disclosure would harm an interest protected by one of the nine statutory exemptions found at 5 U.S.C. 552(b) or determines that disclosure is prohibited by law, all relevant records obtained through reasonable search efforts shall be provided within the relevant time period described in paragraph (b) of this section.

(2) *Partial grant/denial of request.* Any reasonably segregable portion(s) of a record shall be provided to the person requesting it after the deletion of any exempt portion(s) of the record. The applicable exemption(s) and the amount of information deleted shall be indicated on the released portion(s) of the record, at the place in the record the deletion is made if technically feasible, unless indicating the extent of the deletion would harm an interest protected by the exemption pursuant to which the deletion is made.

(3) *Denial of request.* In denying a request for records, the Commission shall state the reason for the denial and the applicable exemption; set forth the name and title or position of the person responsible for the denial of the request; make a reasonable effort to estimate the volume of the

records denied; and provide this estimate to the person making the request, unless providing such an estimate would harm an interest protected by the exemption pursuant to which the request is denied.

(4) *Determination of request to expedite.* Notice of the determination whether to grant expedited processing in response to a requester's claim of compelling need shall be provided to the person making the request within 10 days after receipt of the request for expedited processing.

(5) *Determination of fee waiver/reduction request.* The Chief FOIA Officer or designated employee, upon request, shall determine whether a waiver or reduction of fees is warranted. See § 2702.10 for additional information.

(e) *Dispute resolution.* At any time during the processing of a request, requesters may seek dispute resolution assistance from the Commission's FOIA Public Liaison at FOIA-Liaison@fmshrc.gov. In the event of an adverse determination, requesters may file an appeal in accordance with § 2702.5 and/or obtain mediation and dispute resolution services from the Commission's FOIA Public Liaison, as well as from the Office of Government Information Services ("OGIS") at <https://archives.gov/ogis>. Additional information regarding dispute resolution can be found on the Commission's website at <https://www.fmshrc.gov/content/foia-public-liaison>.

§ 2702.5 Right to appeal.

(a) *Generally.* Any requester adversely affected by a final decision of the Commission's FOIA Office may file an appeal of that decision within 90 days of the initial determination. All FOIA appeals must be in writing and shall be made to the Chair of the Commission. Sitting Commissioners will decide appeals within 20 business days after receipt. In the event that a sitting Commissioner is the subject of the disputed FOIA records or has a substantial interest in the disputed records, that Commissioner should be recused from consideration of said FOIA appeal. In the event of a tie vote of those Commissioners, the FOIA Office's initial determination will be deemed approved by the Commission. Appeals must be submitted via email, mail, fax or hand delivery to FOIA-appeals@fmshrc.gov, Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710, Fax: 202-434-9944.

(b) *Appeal of denial or partial denial of information request.* The appeal must include a copy of the initial FOIA request, a copy of the determination denying the request in whole or in part, and a detailed statement explaining why the initial determination should be reversed. Any records to be disclosed by the Commission to the requester shall be provided with the letter setting forth the determination as to the appeal or shall be sent as soon as possible thereafter.

(c) *Appeal of denial of request to expedite.* The appeal must include a copy of the initial request to expedite, a copy of the determination denying the request, and a detailed explanation demonstrating a compelling need as stated in §

2702.4(b)(3). The Commission will provide expeditious consideration of administrative appeals of determinations on whether to provide expedited processing. Once a determination has been made to grant expedited processing, the Commission will process the request as soon as practicable.

(d) *Appeal of denial of fee waiver or reduction.* The appeal must include a copy of the initial fee waiver/reduction request, a copy of the determination denying the request, and a detailed statement explaining how the request satisfies one or more requirements in § 2702.10(b).

(e) *Denial of appeal.* If an appeal is denied, the Commission's notice of denial shall inform the requester of the right to obtain judicial review of the Commission's action under 5 U.S.C. 552(a)(4)(B)-(G). The requester may appeal the Commission's decision by filing a complaint in the district court of the United States in the district in which the complainant resides, or has its principal place of business, or in which the agency records are situated, or in the District of Columbia.

§ 2702.6 Confidential commercial information.

(a) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 52(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.*

(1) The Commission will promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the Commission determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The Commission has a reason to believe that the requested information may be protected from disclosure under Exemption 4,

but has not yet determined whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The Commission determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, the Commission will give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a date specified for disclosure.

(e) *Opportunity to object to disclosure.*

(1) If the submitter objects to disclosure of any of the requested information, a written response to the notice issued under paragraph (c) of this section must be submitted to the Commission within 30 calendar days of the date of the notice.

(2) The response must include a detailed statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 of the FOIA as a basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within 30 calendar days will be considered to have no objection to disclosure of the information. The Commission is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this part may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Commission will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever the Commission decides to disclose information over the objection of a submitter, the Commission will provide the submitter written notice, which shall include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the Commission intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the agency must promptly notify the submitter.

(i) *Requester notification.* The Commission will notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

(j) *Effect of disclosure.* Once a record has been disclosed by the Commission to any requester, that record will no longer be deemed confidential commercial information and protected under this section.

§ 2702.7 Materials available.

(a) *Records.* Except for records and information under seal or exempted from disclosure, all records of the Commission or in its custody are available to any person who requests them in accordance with § 2702.3. Records include any information that would be a record subject to the requirements of 5 U.S.C. 552 when maintained by the Commission in any format, including electronic format.

In response to FOIA requests, the Commission will search for records manually or by automated means, except when an automated search would significantly interfere with the operation of the Commission's automated information system.

(b) *FOIA e-reading room*. Materials created on or after November 1, 1996, under this paragraph (b) may be accessed electronically through the Commission's website at <https://www.fmssrc.gov/foia/e-reading-room>. Materials available include, but are not limited to:

- (1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (2) Those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (3) Administrative staff manuals and instructions to staff that affect a member of the public;
- (4) Copies of all records, regardless of form or format, which have been released to any person under this part and which, because of the nature of their subject matter, the Commission has determined have become or are likely to become the subject of subsequent requests for substantially the same records; and
- (5) A general index of records referred to under this paragraph (b).

(c) *FOIA in-office review*. Materials are also available for inspection and copying at the Commission's headquarters located at 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC, 20004-1710.

§ 2702.8 Categories of requesters and applicable fees.

(a) *Commercial requesters*. When documents are requested for commercial use, the requester will be assessed the full direct costs of searching for, reviewing for release, and duplicating the records sought.

(b) *Educational or noncommercial scientific institutions requesters*. When records are being requested by educational or noncommercial scientific institutions whose purpose is scholarly or scientific research, and not for commercial use, the requester will be assessed only for the cost of duplicating the records sought, but no charge will be made for the first 100 paper pages reproduced.

(c) *News media requesters*. When records are being requested by representatives of the "news media," as defined by 5 U.S.C. 552(a)(4)(A)(ii) of the FOIA, the requester will be assessed only for the cost of duplicating the records sought, but no charge will be made for the first 100 paper pages reproduced. When records are being requested by representatives of the news media.

(d) *Other requesters*. For any other request not described in paragraphs (a) through (c) of this section, the requester will be assessed the full direct costs of searching for and duplicating the records sought, except that no charge will be

made for the first two hours of manual search time and the first 100 paper pages of reproduction.

(e) *Requesters acting in concert.* For purposes of paragraphs (b) through (d) of this section, whenever it reasonably appears that a requester, or a group of requesters acting in concert, is attempting to break down a single request into a series of requests relating to the same subject matter for the purpose of evading the assessment of fees, such requests will be aggregated and fees assessed accordingly.

(f) *Clarification of records use.* Where the FOIA officer has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the FOIA officer may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes.

§ 2702.9 Fee schedule.

(a) *Search fee.* The fee for searching for information and records shall be the salary rate (that is, basic pay plus 16%) of the employee making the search. This hourly rate is listed in the Commission's FOIA Guide at <https://www.fmshr.gov/guides/foia-guide>. Fees for searches of computerized records shall be the actual cost to the Commission but shall not exceed \$300 per hour. This fee includes machine time and that of the operator and clerical personnel. If search charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in

advance his willingness to pay fees as high as those anticipated. Fees may be charged even if the documents are not located or if they are located but withheld on the basis of an exemption.

(b) *Review fee.* The review fee shall be charged for the Chief FOIA Officer's initial examination of documents located in response to a request in order to determine if they may be withheld from disclosure, and for the deletion of portions that are exempt from disclosure, but shall not be charged for review by the Chair or the Commissioners. See § 2702.5. The review fee is the salary rate (that is, basic pay plus 16%) of the Chief FOIA Officer or the employee designated to perform the review. This hourly rate is listed in the Commission's FOIA Guide at <https://www.fmshrc.gov/guides/foia-guide>.

(c) *Duplicating fee.* The copy fee for each page of paper up to 8 ½" x 14," including the scanning of pages not routinely stored in electronic format, shall be \$.25 per page. When the use of third-party services is required, the fee will be the actual direct cost incurred by the Commission. For copies of records produced on tapes, disks, or other media, the Commission shall charge the direct costs of production of the material, including operator time. For other methods of reproduction or duplication, the Commission will charge the actual direct costs of producing the document(s). If duplication charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated.

§ 2702.10 Waivers and reduction of fees.

(a) *Automatic fee waiver.* No fees shall be charged to any requester, including commercial use requesters, if the anticipated cost of processing and collecting the fee would be equal to or greater than the fee itself. Accordingly, the Commission has determined that fees of less than \$20 shall be waived.

(b) *Request for fee waiver or reduction.* A request for fee waiver or reduction shall be made in writing and shall address the criteria outlined in paragraphs (b)(1) through (6) of this section. The request should be submitted with the original request for information filed pursuant to § 2702.3(a). If the request is granted, the documents shall be furnished without any charge, or at a charge reduced below the fees otherwise applicable. A waiver or reduction of fees will be granted only if disclosure of the information is determined to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. The following six factors will be employed in determining when such fees shall be waived or reduced:

(1) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government;”

(2) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;

(3) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding;”

(4) The significance of contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities;

(5) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) The primary interest in disclosure: Whether the magnitude of any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

(c) *Determination.* The Chief FOIA Officer, upon request, shall determine whether a waiver or reduction of fees is warranted.

§ 2702. 11 Payment of fees; advance payments; interest; debt collection.

(a) *Payment of fees.* Upon receipt of the invoice or statement detailing the charges incurred for processing, the requester shall make payment within 30 calendar days to the Federal Mine Safety and Health Review Commission or FMSHRC, Attention: Office of the Executive Director, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, DC 20004-1710.

(b) *Advance payment.* Before work is commenced or continued on a request, advance payment may be required if the charges are likely to exceed \$250.

(c) *Delinquent requesters.* Requesters who have previously failed to pay FOIA processing fees associated with a prior request, within the time mandated by paragraph (a) of this section, and are unable to demonstrate that the fee was previously paid, may be required to first pay the unpaid balance plus any applicable interest and then make an advance payment of the full amount of the estimated fee before the new or pending request is processed.

(d) *Interest charges.* Interest charges may be assessed on any unpaid bill starting on the 31st day following the day on which the billing was sent, at the rate prescribed in 31 U.S.C. 3717, and will accrue from the date of billing.

(e) *Debt collection.* The Debt Collection Act of 1982, Pub. L. 97-365, including disclosure to consumer credit reporting agencies and the use of collection agencies, will be utilized to encourage payment where appropriate.

§ 2702.12 Preservation of records.

Pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration, the Commission preserves all correspondence pertaining to requests received under this part, as well as copies of all requested records for six years following final agency action or three years after final adjudication by the courts, whichever is later. The Commission will not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

Dated: August 25, 2021.

Arthur R. Traynor, III

Chair, Federal Mine Safety and Health Review Commission.

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